

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PAUL REVERE LIFE INSURANCE
COMPANY,

Plaintiff,

-vs-

MARCUS DEWOOD,

Defendant.

NO. CV-04-0456-LRS
CONSOLIDATED

**ORDER GRANTING IN PART AND
DENYING IN PART PAUL REVERE'S
MOTION FOR SUMMARY JUDGMENT**

BEFORE THE COURT is Paul Revere's motion for summary judgment. (**Ct. Rec. 132**)¹ On June 22, 2006, the Court delivered its oral ruling to this motion. This Order is entered to memorialize and supplement the Court's oral ruling on that day, which is incorporated herein by reference.

Accordingly, **IT IS HEREBY ORDERED:**

1. Judicial Estoppel

The first question before the Court is whether judicial estoppel precludes Mr. DeWood's current lawsuit against Paul Revere. Paul Revere argues that because Mr. Dewood blamed his former attorney for the alleged delay in the previous state court lawsuit, he is now estopped from suing
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¹As stated on the record during this Court's oral ruling, for purposes of this order, any reference to Plaintiff refers to Marcus Dewood.

1 the insurance company. As stated on the record, this portion of the
2 motion is **DENIED**. Plaintiff's claims are not barred by judicial estoppel.

3 However, the record is clear that Mr. DeWood blamed his former
4 attorneys for the delay, and Mr. DeWood will be bound as a matter of law
5 to the representations he made in that litigation. Such statements
6 constitute admissions and, subject to the Rules of Evidence, will be
7 admissible in the current litigation. Plaintiff will have the burden of
8 proving liability against the Defendant Paul Revere as well as damages.
9 These obligations will remain with Plaintiff DeWood in this litigation.

10 **2. Breach of the Implied Covenant of Good Faith**

11 The implied covenant of good faith is not separate from those
12 obligations imposed on Paul Revere by the insurance contract and
13 applicable law in this case. No real difference exists between the
14 fiduciary duty and the duty of good faith in the insurance context. *Van*
15 *Noy v. State Farm*, 142 Wn.2d 784, 793-794. (2000) ("the duty to act in good
16 faith or liability for acting in bad faith generally refers to the same
17 obligation....the fiduciary relationship existing between the insurer and
18 the insured.") Therefore, to the extent Plaintiff is attempting to state
19 a claim for violation of good faith independent of a fiduciary duty
20 claim, any such claim is **DISMISSED**.

21 **3. Plaintiff's Bad Faith Tort and Consumer Protection Act Claims**

22 Plaintiff's counterclaim was filed in December 2004. A demand
23 letter sent by his former attorney in July 2001 clearly indicates that
24 Plaintiff was aware of the duty of good faith as to the tort claims.
25 Application of the three year statute of limitations on bad faith tort
26 claims bars actions which were known and had occurred three years prior

1 to the time of filing suit. See RCW 4.16.080. Plaintiff's counterclaim
2 was filed in December 2004. Therefore, to the extent Plaintiff's bad
3 faith tort claims are based on actions that occurred three or more years
4 prior to the date the counterclaim was filed, these claims are **BARRED** by
5 the statute of limitations.

6 Similarly, because the July 2001 letter from counsel specifically
7 referenced alleged violations of the Washington Consumer Protection Act,
8 Plaintiff DeWood was on notice that he had a potential claim. However,
9 the counterclaim was not filed until December 2004. The statute of
10 limitations for a claim brought under the Washington Consumer Protection
11 Act is four years. RCW 19.86.120. Therefore, all claims that occurred
12 four or more years before the filing of Plaintiff's counterclaims are
13 **BARRED** by the statute of limitations.

14 **4. Plaintiff's Emotional Distress Claims**

15 Plaintiff's claims for emotional distress are **DISMISSED** because they
16 are not properly before this Court. Plaintiff did not identify these
17 claims in his Fed. Rule Civ. P. 26(a) disclosures, nor were the damages
18 calculated as a result. Moreover, discovery materials propounded by
19 Plaintiff were not itemized or supplemented in a manner which gave
20 reasonable notice to Paul Revere as to the state of the record or the
21 nature of the demands being made. In addition, no expert witnesses were
22 identified or produced who can testify concerning emotional distress
23 damages. Defendant Paul Revere is not required to search out such
24 experts in the absence of appropriate disclosures by Plaintiff DeWood.

25 **5. Plaintiff's Forced Real Estate Sales and Damages Claim**

26 These claims are not properly before the Court, and are therefore,

1 **DISMISSED.** The damages were not specifically identified nor was a means
2 for calculating them reasonably communicated to the insurance company in
3 order for proper discovery to be propounded. In addition, the information
4 supplied does not appear to provide reasonable notice, and it does not
5 amount to substantial evidence, which would support the claim.
6 Furthermore, consequential damages that are speculative and remote are
7 not recoverable.

8 **6. Plaintiff's Recovery of Unreasonable Attorney's Fees in Prior**
9 **Litigation**

10 As stated on the record, fees which by definition are unreasonable
11 may not be recovered. Therefore, any claims for unreasonable fees are
12 **DISMISSED.** However, reasonable fees, if shown to have resulted from
13 Defendant's conduct under circumstances giving rise to liability may be
14 considered in accord with the Court's earlier ruling in this case.

15 For the reasons stated above, Paul Revere's Motion for Summary
16 Judgment (Ct. Rec. 132) is **DENIED IN PART** and **GRANTED IN PART.**

17 **IT IS SO ORDERED.**

18 The District Court Executive is directed to file this Order and
19 provide copies to counsel.

20 **DATED** this 28th day of June, 2006.

21 *s/Lonny R. Suko*

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23 LONNY R. SUKO
24 UNITED STATES DISTRICT JUDGE
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